92-1309

Supreme Court, U.S.
FILED
JUN 17 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CHARLES McFERREN,
PETITIONER

vs.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES McFERREN
REG-NO- 86045-024
P.O. BOX 1000
MILAN MICH 48160

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit committed reversible error by affirming the judgment of the United States District Court, entered without subject matter jurisdiction and based upon a violation of the Ex Post Facto Provision of the Constitution Of the United States?

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RULES

Federal Rule of Criminal Procedure 35.	10

OPINIONS BELOW

The February 18, 1992 and April 24, 1992 opinions of the Court of Appeals, whose judgment is herein sought to be reviewed, in Case No. 91-1202, which decisions are unpublished and are reprinted in the separate Appendix to this Petition, pp. 14-15. The prior opinions of the United States District Court for the Eastern District of Michigan, entered January 17, 1991 and January 23, 1991, in case no. 89-80515, which decisions are unpublished and are reprinted in the separate Appendix to this Petition, pp. 16-23.

STATEMENT OF JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were entered on February 18, 1992 and April 24, 1992. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision involved in this case is Article 1 Sec. 10 which reads as follows:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainer, Ex Post Facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and

all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

STATEMENT OF CASE

On August 2, 1989, a Complaint was filed in the United States District Court for the Eastern District of Michigan, Southern Division, charging Charles McFerren and others with violations of 21 USC §§ 841(a), 843(b) and 846; 18 USC § 922(q); 18 USC § 924(c); and 26 USC § 7201.

On August 8, 1990, Petitioner plead guilty to three (3) counts of the Complaint.

On January 17, 1991, Petitioner was sentenced to a seven (7) year term of imprisonment. Further, on January 17, 1991, Petitioner was ordered to begin his sentence and was remanded by the Court to the custody of the Bureau of Prisons.

On January 22, 1991, upon the Court's own motion, Petitioner's original seven (7) year sentence was increased to twelve (12) years plus two (2) years special parole.

The District Court Order of Sentence was entered January 23, 1991.

On February 15, 1991, Petitioner filed a Claim of Appeal with the United States Court of Appeals for the Sixth Circuit.

On February 18, 1992, the United States Court of Appeals for the Sixth Circuit affirmed the January 23, 1991 Order of Sentence.

On March 30, 1992, Petitioner filed a Motion for Reconsideration of the February 18, 1992 Order.

On April 24, 1992, the United States Court of Appeals for the Sixth Circuit denied Petitioner's motion.

REASON'S FOR GRANTING REQUESTED RELIEF

The sole reason for granting the relief requested, is the District Court's lack of subject matter jurisdiction on January 22, 1991 to resentence the Petitioner. The Sixth Circuit Court of Appeals made a determination that the District Court had subject matter jurisdiction, authorized by Rule 35(c) of the Federal Rules of Criminal Procedure. However, Rule 35(c) was not enacted until December 1, 1991, fully ten (10) months following the resentencing of Petitioner. This is a clear violation of the Ex Post Facto provision of Article I, Section 10 of the United States Constitution. Further, Rule 35, as in effect on January 22, 1991, had no provision allowing the District Court to resentence the Petitioner.

A court has the power and duty to examine and to determine whether it has subject matter jurisdiction over causes

presented to it. Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company, 270 U.S. 266 (1926).

In the case at bar, the District Court exercised subject matter jurisdiction based solely on the consent of the Petitioner. However, a party cannot by consent give a court subject matter jurisdiction over matters which it would not otherwise have. Thus, a judgment pronounced by said court is not validated by consent. Porter v. Porter, 101 Ariz. 131, 416 P.2d 564 (1966), cert. denied 386 U.S. 957 (1967); State ex rel. Peterson v. Dunlap, 28 Idaho 784, 156 P. 1141 (1916); Godfrey v. Valentine, 39 Minn. 336, 40 N.W. 163 (1888).

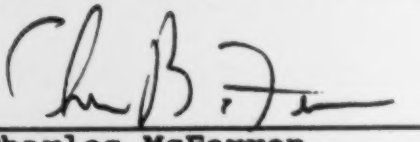
In the case at bar, Petitioner, with no apparent knowledge of the District Court's lack of subject matter jurisdiction, despite legal counsel, unknowingly waived a nonwaiveable jurisdictional defect. Thus, the January

23, 1991 Order of Sentence must be striken and the original sentence of seven (7) years be reinstated.

RELIEF REQUESTED

Wherefore, the Petitioner respectfully requests that this Honorable Court reverse the decisions of the Court of Appeals and reinstitute Petitioner's sentence in this matter as ordered by the District Court on January 17, 1991.

Respectfully submitted,



Charles McFerren
Reg. No. 86045-024
P.O. Box 1000
Milan, MI 48160

January 5, 1993

APPENDIX

Case No: 91-1202

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHARLES MCFERREN

Defendant - Appellant

BEFORE: MERRITT, Chief Judge; SUHRHEINRICH and SILER, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

2/18/92

Leonard Green, Clerk

Case No: 91-1202

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHARLES MCFERREN

Defendant - Appellant

This court has received a letter from the appellant which has been construed as a motion for reconsideration of the April 2, 1992 order denying his petition for rehearing as being untimely.

Upon consideration, it is ORDERED that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

4/24/92

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v. Criminal Action
No. 89-80515

CHARLES McFERREN,

Defendant.
_____/

Proceedings had in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan, on Thursday, January 17, 1991.

APPEARANCES:

MICHAEL LANG, Esq.
Assistant United States Attorney
817 Federal Building
Detroit, Michigan 48226

Appearing on behalf of United States of America

DON FERRIS, Esq.
Suite 10
2004 Hogback
Ann Arbor, Michigan 48105

Appearing on behalf of Defendant Charles McFerren

Detroit, Michigan

Thursday, January 17, 1991

- - -

THE CLERK OF THE COURT: Docket No. 89-80515, United States of America v Charles McFerren.

MR. FERRIS: Don Ferris appearing on behalf and with Charles McFerren.

MR. LANG: Michael Lang on behalf of the Government, your Honor.

MR. FERRIS: Your Honor, we have read the pre-sentence report. We have no additions or corrections to the report.

I have filed a sentencing memorandum with the court, and I have nothing further to say other than what I have said in that memorandum.

I would ask the Court allow Mr. McFerren to report to the designated institution, and to be given 60 days from today's date to report to that institution.

THE COURT: Mr. McFerren, do you want to say anything?

DEFENDANT McFERREN: No, your Honor.

THE COURT: Mr. Lang?

MR. LANG: No, your Honor.

THE COURT: Mr. McFerren, it's the sentence of the Court that you be committed to the custody of the Attorney General on Count One for a term of seven years. That you be committed to the custody of the Attorney General on County Thirty-Two for a term of five years, consecutive to Count One. And that you be committed on County Thirty-Six to a term of 27 months, concurrent with Count One. That a $150.00 special assessment be imposed. And that you be remanded to the custody of the Marshal as of this time.

MR. FERRIS: Your Honor, may he have three weeks to get his property out of the home that is being forfeited to the United States Government?

THE COURT: No.

Mr. McFerren has had a long history of association with the criminal justice system. He should begin the renewal of that relationship forthwith, sir.

He is remanded to the custody of the Marshal.

DEFENDANT McFERREN: Your Honor --

THE COURT: I will hear nothing further, sir.

MR. LANG: Thank you, your Honor.

- - -

REPORTER'S CERTIFICATE

I, HERMAN H. TAPPERT, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within entitled and numbered cause on the date hereinabove set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

HERMAN H. TAPPERT
Official Court Reporter

Detroit, Michigan 48226

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v. Criminal Action
No. 89-80515

CHARLES McFERREN,

Defendant.
_____/

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count 1 - twelve (12) years under Section 4205(b)(1) plus two (2) years supervised release with condition that defendant participate in drug program, if

necessary, as directed by the Probation Department.

Count 32 - seven (7) months

Count 36 - five (5) years be DISMISSED.

IT IS ORDERED that Counts 3, 5, 6, 7, 8, 9, 10, 11, 12, 14-31, 37, 38, 39, 40, 41/ All sentences to run concurrent with each other.

Defendant is ordered to pay $50.00 Special Assessment on each Count for a TOTAL of $150.00.

IT IS FURTHER ORDERED defendant's bond be continued to FEBRUARY 13, 1991 at 12:00 noon at which time defendant is to surrender himself to the institution designated by the Attorney General.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at

any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

_____

AVERN COHN

DATE 01/23/91